Supreme Court, U.S.
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No. 95-660

(2)

In the

Supreme Court of the United States

October Term, 1995

David A. Nowicki, Petitioner,

v.

Lucy Cooper, Respondent.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Seventh Circuit.

Brief in Opposition to Petition

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BEST AVAILABLE COPY

12 pp

QUESTION PRESENTED

Respondent, Assistant Family Court Commissioner Lucy Cooper (Commissioner Cooper) objects to the form and substance of the "Questions Presented" as set forth in the petition for writ of certiorari. The only question fairly presented is whether the respondent, an assistant family court commissioner, is immune from a claim for money damages under the doctrine of absolute judicial immunity when that claim is based upon her exercise of discretion in (1) excluding the petitioner (who was neither a party nor an attorney for any party) from a hearing on a post-divorce motion concerning child custody, and prohibiting him from making an audio recording of the proceeding, and (2) limiting the participation of the petitioner (who was neither a party nor an attorney for any party) in a hearing on a post-divorce motion concerning child support, and prohibiting him from making an audio recording of the proceeding.

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OPINIONS BELOW

The petitioner's action was dismissed *sua sponte* by the Honorable Thomas J. Curran, United States District Judge in the Eastern District of Wisconsin, in an order dated July 29, 1993. The petitioner appealed that order to the United States Court of Appeals for the Seventh Circuit. In a decision rendered June 1, 1995, that court affirmed in part and reversed in part and remanded the case to the District Court. A copy of that decision is appended to the petition for writ of certiorari. In particular, the Court of Appeals upheld the District Court insofar as the District Court dismissed the petitioner's claims for damages on the grounds of absolute judicial immunity. It appears that the petitioner seeks Supreme Court review of that aspect of the decision of the Court of Appeals.

At present, what remains of the petitioner's action in the District Court has been referred to the Bankruptcy Court by a *sua sponte* order of the District Court dated August 30, 1995. That order recites that the petitioner has filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code and directs that the matter be referred to the Bankruptcy Court so that the trustee can determine whether the action should be maintained, pursuant to 11 U.S.C. ss. 704 and 1302. Respondent has received no notice of any activity in or by the Bankruptcy Court concerning this action.

JURISDICTION

The Supreme Court has jurisdiction to entertain the petition for writ of certiorari to review the decision of the Court of Appeals, despite the fact that no final judgment of decree has been entered in that court or in the District Court in this action. 28 U.S.C. ss. 1254 and 210(e).

However, respondent respectfully submits that there are no grounds to warrant the Supreme Court's exercise of that jurisdiction in this case. There are no compelling reasons to grant the writ. This case satisfies none of the criteria in Rule 10 which are illustrative of the character of the reasons which the Court is inclined to consider in deciding whether to grant the writ. On the contrary, the decision of the Court of Appeals on the question of the petitioner's damage claims is squarely in accord with numerous decisions of the Supreme Court and the Courts of Appeal on the subject of judicial immunity. Even if the Court of Appeals were arguably in error as to the meaning or application of that doctrine, which it is not, the petitioner cannot show that his case is of such imperative public importance that it requires immediate determination in the Supreme Court under the standard set forth in Rule 11.

STATEMENT OF THE CASE

Petitioner Nowicki, a self-styled "Notary Public and Independent Paralegal", commenced a civil rights action against Assistant Family Court Commissioner Lucy Cooper, seeking damages as well as injunctive relief, by filing a complaint in the United States District Court for the Eastern District of Wisconsin on July 27, 1993. The gravamen of his complaint is that, in each of two cases in which he was allegedly retained to tape-record proceedings and to provide other less well-defined "paralegal" services to one of the parties in a post-divorce hearing before the Family Court Commissioner, he was prevented from tape-recording the hearing and, in one case, excluded from the hearing room by Commissioner Cooper.

Almost immediately upon the filing of the complaint, the District Court rendered a decision and order dismissing the

complaint. Petitioner appealed that order to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the decision of the District Court with respect to the damage claims but reversed in part and remanded the action for further proceedings on certain of the petitioner's claims for injunctive relief, that court having evidently concluded that the District Court has been too summary in its disposition of that aspect of the petitioner's complaint. The District Court has referred that surviving portion of the complaint to the Bankruptcy Court for assessment by the trustee because the petitioner has filed a petition for relief under Chapter 13 of the Bankruptcy Code.

As a result of the District Court's prompt and summary disposition of this action when it was initially filed and the post-remand suspension of proceedings in that court due to the petitioner's bankruptcy action, there is no factual record in this case. The petitioner's various submissions in this case are full of what purport to be "facts". Some are substantially accurate. Many are not.

The petitioner is, as he describes himself, not an attorney and not a party to either of the family court actions referred to in his petitioner for writ of certiorari. He is associated with an organization known as the "Divorced Dads' Organization". That organization is not recognized by Milwaukee County as a "community resource" within the meaning of s. 767.081(2)(a)3, Wis. Stats. The most charitable description of the petitioner's activities in connection with family court litigation, such as the two cases referred to in his complaint and in his petition for writ of certiorari, is attempting the unauthorized practice of law. See, App. 3-5, Appendix to Petition for Writ of Certiorari (slip opinion of Court of Appeals). Typically, he sells his "paralegal" services directly to litigants and attempts to introduce himself into litigation,

purportedly as an advocate for fathers, in a manner which serves only to inflame the parties and impede resolution of disputes. The Grabczyk case, which is referenced in the petition for writ of certiorari, provides a telling example. That case came before Commissioner Cooper on the motion of the former Mrs. Grabczyk for in an increase in child support, which had remained unchanged for the nearly ten years since the parties' divorce. On the advice of petitioner, Mr. Grabczyk countered that request for an increase in child support with a groundless motion denying paternity of his children, who were, at the time of that motion, 12 and 15 years old.

Petitioner's statement of the case mistakenly alleges that there are other groups which attempt to provide the same "services" as those which the petitioner attempts to provide. There are organizations which serve both men and women and which assist persons of limited means who are proceeding *pro se* in family court actions. However, such organizations provide only form pleadings and instructions. They do not, nor would they be permitted to, appear in court with their clients.

Commissioner Cooper is an assistant family court commissioner for Milwaukee County. In that capacity, she presides over hearings, makes findings, and renders decisions in a wide variety of family court litigation which, either by explicit statutory authority or by delegation of authority by the circuit court, devolve upon the Family Court Commissioner. This includes hearings, such those referenced in the petition for writ of certiorari, involving requests for post-divorce judgment revisions in child support, custody and visitation. Sec. 767.13(5)(b), Wis. Stats.There is no provision for stenographic recording of those hearings.

Commissioner Cooper did forbid the petitioner to make

unofficial tape recordings of hearings on two occasions, as alleged by the petitioner. She also excluded the petitioner from her hearing room on one of those occasions. For reasons more fully described in the Argument portion of this brief, those actions were not "ministerial" but involved the exercise of judicial discretion and were well within the ambit of her judicial functions.

ARGUMENT

Commissioner Cooper is immune from a claim for money damages based on allegations that she forbad the petitioner to tape record proceedings or otherwise limited his participation in hearings in which he was neither a party nor an attorney for a party.

Wisconsin family court commissioners are entitled to absolute judicial immunity. It is well settled that judges are absolutely immune from claims for money damages, including claims under 42 U.S.C. s. 1983, arising from acts done in the exercise of a judge's judicial function. Pierson v. Ray, 386 U.S. 547 (1967). It is likewise well settled that the doctrine of absolute judicial immunity protects other public officers who, while not technically classified as "judges", perform the same essential functions as judges. In Butz v. Economou , 438 U.S. 478 (1978), the court extended the absolute immunity doctrine articulated in Pierson to hearing examiners and administrative law judges when they are acting in a judicial capacity, based upon the "functional comparability" of those officers to judges.

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is "functionally comparable" to that of a judge. His powers are

> often, if not generally comparable to those of a trial judge. He may issue subpoenas, rule on proffers of evidence, regulate the conduct of the hearing, and make or recommend decisions.

Butz, 438 U.S. 478, 513. The Court might just as aptly use that language to describe the functional comparability of judges and family court commissioners in actions affecting the family under ch. 767, Wis. Stats.

Whether an act is "judicial", and therefore falls within the ambit of absolute judicial immunity, depends upon the nature and the function of the act, rather than the specific act complained of. That is so regardless of whether the specific act complained of was in error, in excess of the judge's authority, or evinces malice or other corrupt motives. Mireles v. Waco, 502 U.S. 9, 12 (1991).

Whether the nature and function of an act is "judicial" relates to whether it is a function normally performed by a judge and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. Stump v. Sparkman, 435 U.S. 349, 362 (1978).

Controlling the conduct of a hearing, which would include deciding who other than the parties and their counsel shall be admitted to the hearing and regulating the behavior of those in attendance, is quintessentially a judicial function. Certainly it is a function normally performed by a judge. No one with the slightest actual experience with trial-level judges or court commissioners would ever suggest during a hearing that anyone other than the judge or commissioner is or should be in charge. When a judge or commissioner runs a hearing, those whose conduct the judge or commissioner directs are

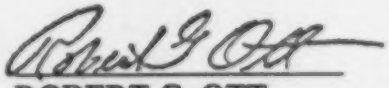
obviously dealing with him or her as a judge or commissioner.

Under the law applicable to the specific judicial actions complained of, those actions are by definition "judicial". The Wisconsin supreme court has expressly committed the regulation of tape-recording to the sound discretion of the family court commissioners. Forsythe v. Family Court Comm'r, 131 Wis. 2d 322, 388 N.W.2d 580 (1986). Whether in a particular instance that discretion is properly exercised is, for purposes of a judicial immunity analysis, beside the point. The Wisconsin supreme court has established that the nature and function of the act is judicial. The Wisconsin statutes give to the family courts and commissioners the authority to close hearings to all but the parties, their counsel and guardians ad litem, on their own motion or on the motion of any party. Sec. 767.19(2), Wis. Stats. Whether such a motion should be granted in a particular case is not relevant to a judicial immunity defense. The nature and function of the act of controlling admission to a family court hearing is, according to the Wisconsin legislature, judicial.

CONCLUSION

For the foregoing reasons, Commissioner Cooper is absolutely immune from any claim for money damages arising from her decisions to exlude the petitioner from a hearing or to forbid him from tape recording hearings. She therefore respectfully urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,



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